

## Megaregionals and the Others — A Rejoinder

PAUL MERTENSKÖTTER — THOMAS STREINZ — 29 June, 2016



We thank the *Völkerrechtsblog* for hosting this symposium and are immensely grateful to [Abhimanyu George Jain](#) and [Azwi Langalanga](#) for offering their insightful views. We take this opportunity to reply to both posts and to reflect on some further themes coming out of the [ICON-S 2016](#) panels that dealt with the megaregionals.

The discussions around TTIP and TPP often focus on the agreements purported domestic effects and neglect the megaregionals' possibly far-reaching implications for non-parties (both positive and negative) and the future of global economic ordering and governance more generally. Against the backdrop of the BRICS (Brazil, Russia, India, China, and

South Africa) economies gaining in relative importance, TTIP and TPP can be viewed as an attempt by the most powerful industrialized nations of the 20<sup>th</sup> century to counter this trend. On this reading, the TTIP and TPP aim to reorder the global economic space in a manner structurally beneficial to economic actors that originate from these industrialized nations, and are adapted to their varieties of capitalism and domestic state-market relations. This conceptualization also brings to the fore larger geopolitical considerations implicated by the megaregionals, such as the TPP's role in the United States' pivot to Asia (see [here](#) for Hillary Clinton's 2011 article on America's Pacific Century). Abhimanyu is also sensitive to this dimension in his discussion of the change in India's position on intellectual property, and we believe that an integration of geopolitics with trade analysis is a fruitful angle for scholarship around the megaregionals.

China and India are also promoting their own megaregional—the Regional Comprehensive Economic Partnership (RCEP)—and African countries announced a prospective Tripartite Free Trade Area (TFTA) which could ultimately culminate in a Continental Free Trade Area (CFTA). But the fact that Azwi refers to these initiatives only in passing and Abhimanyu does not mention RCEP at all might be indicative of their relatively low profiles (even locally) and their slim chances of coming to fruition in the near future. Under these circumstances, countries that will not be original members of TPP or TTIP might look towards the WTO as bedrock not only of the multilateral trading system but as their institutional locus for engaging with trade.

**Quo vadis WTO?**

Both Abhimanyu and Azwi treat the WTO as the center of trade-related global economic governance but will it retain this role in a world of megaregionals? The WTO has been struggling to manage the proliferation of bilateral and regional Free Trade Agreements (FTAs) and its monitoring mechanism appears to be a formalistic exercise (counting notifications) rather than an effective governance tool. Rob Howse has argued that the exceptions for regional integration under Article XXIV GATT and Article V GATS do not allow for discrimination in the pursuit of regulatory cooperation, one of the key aims of the TPP and even more so of TTIP. If Howse is right, the parties to the megaregionals (all WTO members) are required to extend the benefits of regulatory cooperation (e.g. mutual recognition) to any WTO member meeting the substantive requirements of the regulatory cooperation measure. On the one hand, this shows the potential of WTO law to keep the megaregionals in check and to make sure that at least some of the megaregionals' (expected) benefits are not restricted to their parties. On the other hand, it is questionable to which extent the disparate impact of megaregionals' regulatory cooperation initiatives, resulting from first-mover advantages and a stake in formulating the substantive policies, can be policed through ex post non-discrimination review at the WTO.

Currently, the WTO, as an institution, seems to lack a strategy for how to react to the emerging megaregionals. It continues to insist on the traditional consensus-based multilateralism that was a key driver for the turn first to bilateral and regional FTAs and now towards the megaregionals (see Benvenisti & Downs for a persuasive explanation of this logic of forum change ). So why not relax the strict requirements for plurilateral agreements under the

WTO's roof (as Hoekman & Mavroidis suggest)? Why not attempt to lend its successful dispute settlement system to the megaregionals to establish itself as the principal adjudicating institution in world trade? Why not serve as a forum for negotiation and dialogue among parties and non-parties to the megaregionals? The preconditions for WTO reform might be better than ever as the megaregionals increase the pressure to compromise (as Azwi and Abhimanyu indicate in their papers).

### **How to protect third parties?**

If the WTO fails to shield third parties from the impact of the megaregionals, this raises the question whether other bodies of international law might provide such protection. In a recent paper, Jan Klabbers argues that the law of treaties might set some limits to the megaregionals' endeavor, at least to the extent that they threaten objective regimes. Another largely underexplored source of third-party protection is fundamental rights. In its Polisario decision of last December the EU's General Court annulled a trade liberalization agreement between the EU and Morocco to the extent that it applied to Western Sahara, a disputed territory that is claimed by Morocco without international recognition. The Court reasoned that the Council of the EU failed to ensure that the agreement would not apply to the detriment of the population in Western Sahara (the third party in this case) and did not entail or encourage infringements of their fundamental rights. This broad approach (if upheld by the Court of Justice) requires the EU to take the fundamental rights of third parties seriously. This has implications for the institutional design and operation of TTIP and plays into the challenge of "participation in a new regulatory paradigm". While one should not expect to find ready-made solutions in

existing economic and social rights jurisprudence, the fundamental rights perspective importantly shifts the focus towards the individual and forces us to think about the actual effects of contemporary trade law and policy.

### **Missing dimensions**

Finally, the seemingly comprehensive coverage of the megaregionals should not blind us to recognize that important dimensions are missing. Fundamental rights is one of them, but there are others, most notably development and tax. The megaregionals appear to be naked economic agreements that cater to business interests without addressing the unavoidable (if not unmanageable) economic and social disruptions and reconfigurations that come with enhanced market access and increased regulatory convergence. Their provision for capacity building is modest at best. While ideas of transnational re-distribution mechanisms still seem utopian, it seems noteworthy that there is no attempt in the megaregionals to increase national revenue by means of collective tax reform (e.g. by challenging tax havens), an effort that is left to the OECD. Azwi's remark that global value chains are often treated with suspicion by commentators in African countries due to their "emphasis on developed country lead firms" raises this point very acutely: the distributive effects of modern cross-border economic organization and trade along value chains and an increasingly digital and services-heavy trading system are poorly understood and should be central to discussions around the megaregionals.

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